IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2726 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GUJARAT STATE ROAD TRANS. CORP.

Versus

GOPAL MOTAMBHAIA PATEL

Appearance:

1. Special Civil Application No. 2726 of 2003

MR HARESH J TRIVEDI for Petitioner No. 1

..... for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 10/04/2003

ORAL JUDGEMENT

Learned advocate Mr. Trivedi appearing for the petitioner has submitted draft amendment alongwith which,

he has produced copy of the policy which has been decided by the Corporation. Considering the averments made in the draft amendment and the contents of the policy, same is allowed with a direction to the petitioner to carry out the same within three weeks from today.

Heard learned advocate Mr.H.J. Trivedi for the petitioner for the petitioner Corporation. Before considering the submissions made by the learned advocate Mr. H.J. Trivedi for the petitioner, it would be just and proper to reproduce few observations made by the Hon'ble apex court which were considered by the Bombay High Court in the matter of Standard Chartered Grindlays Bank Ltd.versus Govind Phophale reported in 2003 (96) FLR 145 which are important and squarely applicable to the facts of the present case. Same are, therefore, reproduced as under:

"(iv) Consumer Education and Research Centre and others v. Union of India and others, [1996 (72) FLR 479 = 1996 (2) LLN 1] in Para 22 and 24 at page 18:

"22. The jurisprudence of personhood or philosophy of the right to life envisaged under Article 21 enlarges its sweep to encompass human personality in its full blossom with invigorated health which is a wealth to the workman to earn his livelihood to sustain the dignity of person and to live a life with dignity and equality.

24. The expression 'life' assured in Article 21 does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure. '

(v) Dr. Ashok v. Union of India and others [(1997) 5 SCC 10]:

Para 11 Headnote, paras. 4 and 5. "Right to life enshrined in Article 21 means right to have something more than survival and not mere existence or animal existence.

It includes all those aspects of life which go to make a man's life meaningful, complete and worth

> living. By giving an extended meaning to the expression "life" in Article 21 the Supreme Court has bought health hazards due to pollution within it and so also the health hazards from use of harmful drugs. "

In this petition, the petitioner Corporation has challenged the award made by the Labour Court, Ahmedabad in Reference No. 1395 of 1996 dated 20th December, 2001 wherein the labour court, Ahmedabad has set aside the order of termination and granted reinstatement on the post equivalent to the post of driver with light work and with continuity of service while protecting the existing wages of the workman respondent and also granted 85 per cent of the back wages for the intervening period.

During the course of hearing, learned advocate Mr. Trivedi appearing for the petitioner has raised the contention before this Court that the labour court has committed an error in granting relief in favour of the respondent workman as contrary to the settlement of the corporation and also contrary to the policy laid down by the corporation. He also submitted that in case of accidental injury, if any inability or incapacity has been earned by the workman, the case of such workman can be considered for light duty on any other equivalent post but in other cases, according to the policy laid down by the corporation, such light duty cannot be offered and, therefore, the relief is beyond the policy and settlement and, therefore, award is required to be quashed and set aside. He also submitted that while granting the relief in favour of the respondent workman, the labour court has not considered the settlement. He also submitted that admittedly, the disability or incapacity earned by the respondent workman was not due to any incident during the course of employment and, therefore, in view of the settlement and policy of the corporation, the labour court was not justified in making the award in question. According to him, the labour court has also committed gross error in granting 85 per cent back wages with continuity of service as the same would unnecessarily create financial burden on the corporation. He has also submitted that the labour court has considered some of the decisions cited at the bar which were relating to the injury received during the course of employment and, therefore, the same were not applicable to the facts of the present case and, therefore, the award based on the said decisions is erroneous and requires to be quashed and set aside. He also submitted that the workman cannot claim the equivalent post of light duty and work as a

matter of right because of his suffering from paralysis. He has also contended that the financial position of the petitioner corporation is weak and, therefore, the labour court ought not to have made the award against the corporation as the workman is not entitled for such benefit under the settlement as well as under the policy and, therefore, the labour court ought not to have passed such an award against the petitioner. Except that, no other submissions have been made by the learned advocate Mr. Trivedi.

In short, the sum and substance of his submissions is that the impugned award made by the labour court is contrary to the law and the policy as well as the settlement of the corporation and, therefore, same is required to be quashed and set aside. He also submitted that recently, the Corporation has passed resolution no. 8344 dated 11th March, 2003 passed by the Board of the Corporation in Meeting No. 532. From the minutes of the said meeting no. 532 produced by Mr. Trivedi, it appears that the proceedings should be initiated for transfer from post only in cases wherein injuries have been received during the course of duty as well as permanent unfitness earned in view of the defect in eyes in reference to the provisions of the settlement. He submitted that earlier, identical provisions were there in the settlement. He also produced on record at Annexure B and pointed out that according to the said policy, the respondent workman is not falling within the ambit and purview of this resolution and, therefore, the award made by the labour court is against law and deserves to be quashed and set aside. He also submitted that because of the stringent financial crisis faced by the corporation, particular policy has been adopted by the corporation. He also submitted that at present,the accumulated losses incurred by the corporation are Rs. 1900.67 crores; staff expenditure are to the tune of 49.69% and the total income and ratio of staff is 7.43 which is higher than the over all ratio of 6.74 of the entire country and, therefore, to curtail the staff cost of the corporation, the corporation has totally banned new recruitment in almost all the cadre and when necessity arise, it is recruiting the persons on fixed wages as a trainee employees. The intention behind such decision is to minimize and curtail the over head expenses. He also submitted that the corporation has come across in the near past more number of such cases and to put cross check on such uncalled for and unwarranted cases, the corporation has been constrained to adopt such policy and to take such decision. Except these submissions, no other submissions have been made by

the learned advocate Mr. Trivedi for the corporation. It is necessary to note that the said policy was not produced by the Corporation before the Labour Court but for the first time, it has been produced before this Court.

I have considered the submissions made by the learned advocate Mr.Trivedi for the petitioner. I have also perused the entire award made by the labour court which is under challenge before this court. As per the facts of the case, the respondent workman was working as a driver in the petitioner corporation since ten years in Ahwa Depot, district Dang. Reference was referred to for adjudication on 31st August, 1996. The respondent workman had filed statement of claim vide Exh. 4. On 6th June, 1996, the workman, all of a sudden had fallen sick and he was suffering from the attack of paralysis and, therefore, he was admitted in the Hospital at Gandhinagar and, thereafter, was shifted at the civil hospital. As per the facts of the present case, because of the attack of paralysis, he has not been able to work as a driver and he has been declared unfit by the Standing Medical Board and ultimately, as he has been declared unfit by the Medical Board, his services were terminated on 22nd June, 1996. Said order of termination of his services was challenged by the respondent before the labour court after raising an industrial dispute. In his statement of claim filed by the respondent workman before the labour court, it has been pointed out by him that after the medical treatment, it was certified in the medical certificate that he is fit for work in a post having light duty; for that, he made request before the competent authority of the corporation but such request was rejected by the corporation; at the time of termination of his services, no notice or notice pay in lieu thereof has been paid to him and no retrenchment compensation has been paid to the respondent workman. No opportunity was given to the respondent before terminating his services on 22nd June, 1996; he remained unemployed inspite of the efforts made by him. On the basis of such averments made in the statement of claim, the workman has prayed for quashing and setting aside the order of termination and for reinstatement in service with full back wages. Initially, notice was issued by the labour court to the Corporation but vide Exh.5, representative of the Corporation had appeared but no reply was submitted but ultimately their right to file reply was closed by the labour court and the workman was examined vide Exh. 8 and nobody was present on behalf of the corporation to cross examine the workman and the right of the petitioner to cross examine was closed vide

Exh. 9. Thereafter, vide Exh. 11, the labour court issued notice to the petitioner that if the petitioner will not remain present, then, the labour court will proceed ex parte. and the said notice was served upon the petitioner corporation and thereafter, the evidence of the workman was also over. Vide Exh. 14, right of the corporation to lead evidence was also closed and vide Exh. 15, the labour court passed ex parte award against the petitioner corporation against which the petitioner filed application for setting aside such an ex parte award and that application was allowed and thereafter, the matter was reheard by the labour court on merits and thereafter reply was filed at Exh. 17 and ultimately, the petitioner raised contention before the labour court that the workman was working at Ahwa as a Driver and because of the paralysis, he was declared unfit by the Medical Board, Civil Hospital, Surat and ultimately, his services were terminated as recategorization was not possible and, therefore, the order of termination was legal and valid and as per the administrative rules. Thereafter, the workman has produced certain documents vide Exh. 7 and 10. The Corporation has also produced certain documents vide list Exh. 21. In the deposition of the workman before the labour court, it was deposed by him that after taking the treatment from the Medical Board, he was to some extent fit for doing the light work and for that, request was made but his request was turned down by the corporation. No doubt, the respondent has admitted one fact that he was not declared unfit in view of any accident occurred during the course of his employment. He also deposed that he remained unemployed from the date of termination. Oral evidence was closed vide purshis Exh. 18 and thereafter, on behalf of the petitioner corporation, one Ramanbhai M. Patel was examined who was working as Establishment supervisor. Witness for the petitioner deposed before the labour court that as the respondent workman was declared unfit by the Medical Board and ultimately, his request for recategorization was rejected, and there was no any provision in the service regulation giving power to the corporation to provide the light work. The settlement is also not applicable to the respondent workman. In short, his evidence is to the effect that there is no such provision to provide light work and that is how, his request was rightly rejected by the corporation. The evidence of the corporation was closed vide Exh. 22 and then vide Exh. 23, written submissions were made wherein it has been contended inter alia by the workman that before terminating his services, no reasonable opportunity was given by the corporation and at the time of termination of his service, no notice or notice pay in

lieu thereof or retrenchment compensation has been paid to him as per section 25F of the I.D. Act, 1947; the Medical Board has declared him unfit for the post of Driver but he was declared fit for the post of Helper but the respondent has not reinstated him on the post of Helper. The workman has relied upon certain decisions in respect of his submissions and thereafter, the corporation has also submitted written submissions before the labour court and has relied upon the administrative instructions and circular as well as the labour settlement Exh. 37 which is applicable to the workman who has suffered injury in an accident during the course of employment and not otherwise. Thereafter, the labour court has examined the merits of the matter and ultimately, the labour court has considered the fact after relying upon the decisions which were referred to by the workman before it. The labour court has relied upon the decision of the Division Bench of this Court in case of one conductor at page 13 of the award in question and relying upon the decision of the Division Bench of this Court, the labour court has come to the conclusion that the facts of the present case are also similar and the workman is also entitled for the reinstatement on other equivalent post wherein light work is available. Therefore, considering the decision of the Division Bench of this Court where the identical facts were there and it was against the very same corporation, the labour court has considered the case of the workman and granted relief on reinstatement on any other equivalent post where light work is available with continuity of service. As regards back wages, the labour court has considered the oral evidence of the respondent workman that he remained unemployed and the petitioner has not been able to establish gainful employment of the respondent workman. The labour court has also considered important aspect that initially, the petitioner corporation remained negligent and as a consequence of such negligence on the part of the petitioner corporation, ex parte award was made by the labour court against the petitioner in the year 1999 vide Exh. 15 and thereafter, the matter was examined on merits. The labour court also considered delay occurred for about three years and considering the negligence on the part of the petitioner in not remaining present, the labour court, keeping in mind that the petitioner corporation is a public body, has declined to grant full back wages but has granted 85 per cent of the back wages for the intervening period by award dated 20th December, 2001.

As stated earlier, I have perused the award. I have also considered the averments made by the petitioner

and the submissions made by the learned advocate Mr. Trivedi on behalf of the petitioner corporation before this Court.

The labour court has considered the decision of the Division Bench of this Court in case of Amarsang Abhesang Vaghela versus GSRTC reported in 2002 II CLR 812 and after considering various decisions of the Apex Court as well as this Court, the Division Bench of this Court has taken view that in such a situation, the workman is entitled for the relief of reinstatement with continuity of service with back wages. This Court has considered the decision of this Court reported in 2001 (1) GLR 184 and other relevant decisions and ultimately, this court has allowed the petition of the driver who was declared unfit for the work of driver and was granted relief by this Court. Similarly, very question has been examined by the Division Bench of this Court in case of GSRTC versus H. T. Parmar reported in 2002 (2) Gujarat High Court Judgments 1010. Relevant observations made by the Division Bench of this Court in para 2 and 3 are reproduced as under:

"2. Upon a reference, the Labour Court allowed the claim of the appellant to give light duty to the respondent by reinstating him in the service with strong reasons and the grounds emerged from the factual profile of the record. It was in terms clearly found by the Labour Court that the workman who has developed physical ailment in the nature of back problems and entailing a problem for resume his original work of a Driver. The labour court, after considering the facts of the case, directed the corporation to reinstate the workman concerned by giving him light work of the Corporation. Apart from the settlement, a master or the Management in a welfare state cannot be allowed to raise the plea that some bodily impairment rendering one person not serviceable for a particular service or job, it does not necessarily mean that the workman concerned should be condemned once for all by removing him or dismissing him from the service. The role of master in such a situation where a semi undertaking public utility or that to a common welfare state to see that physically impaired or a workman injured, is not in a position to work on his original post, then, he could be given the suitable job and lighter work which he is in a position to work despire the handicapisam. This proposition of law is

advanced long before by the catena of judicial pronouncement and has also been done by the parliament in his wisdom in a recent act. The Persons with Disabilities Equal Opportunities, Protection of Rights and Full Participation 3 Act, 1995". This benevolent concept has been placed in a Statute book which is nothing but a social welfare measure for State of people who could not be thrown on such occurrence of injury resulting into partial disability.

3. The award made by the labour court is justified and we are satisfied that the rejection of the writ petition by the learned Single Judge in the aforesaid factual and legal background is fully justified requiring no interference and therefore, this LPA being meritless is required be thrown over the Board at the inception without any order as to costs. "

Thus, the Division Bench of this court has considered the similar question and has confirmed the order passed by the learned Single Judge where same relief has been granted by the learned Single Judge.

Therefore, considering the decisions of the Division Bench of this Court and also considering the facts and circumstances of the present case, the question is whether the workman is entitled for the benefit of reinstatement or not and whether the termination order passed by the petitioner corporation is legal and valid or not. While examining this issue or adjudicating the said question, the labour court is not bound by the settlement or policy of the corporation. All such settlements and/or policy framed by the corporation are binding to the corporation and not to the labour court. If any decision of the corporation where the livelihood of the workman has been taken away, then, the labour court is required to consider this question in accordance with the principles laid down by this court as well as the Hon'ble Apex Court and such settlement or policy of the corporation is not having any binding effect on the labour court. The respondent workman may not be covered by the settlement and policy of the corporation and yet the termination order is found to be illegal by the labour court, then, the labour court is competent to set aside such order and to grant consequential benefits to the workman. The labour court is not bound by any Standing Orders of the Corporation. The labour court is free to create even new conditions of service. Not only that, the labour court is also empowered to vary the

contract of service and, therefore, no such limitations are applicable to the labour court, looking to the scheme of the Industrial Disputes Act, 1947. The labour court is required to examine the legality, validity and propriety of the order of termination independently after considering the settled law laid down by this Court and the Hon'ble Apex Court in that regard and, therefore, the contentions raised by the learned Advocate Mr. H.J. Trivedi in that regard that the case of the workman was not covered by the settlement and policy of the corporation and, therefore, the corporation is right in terminating the services of the workman cannot be accepted. In respect of that, the labour court has come to the conclusion and has rightly concluded that when the workman was declared unfit by the Medical Board for the post of Driver and recommended the Corporation that the workman is fit for the post of helper with light duty, the corporation has not been able to justify as to why the request of the workman for light duty has not been accepted. The labour court has considered that the workman has completed ten years service as a driver in the corporation and the attack of paralysis may be the result of hard work put in by the corporation in the services of the corporation or the same may be because of the continuous abnormal working conditions of driver in the State Transport Service. The labour court has also observed that it may be due to stress and strain of the hard work invested by the workman driver in the service of the corporation which has resulted into attack of paralysis. The fact remains that the workman was having the attack of paralysis during the course of employment. Therefore, that has also considered to be the injury to the workman. The law on this point is settled that if the workman is having heart attack during the course of his employment, then, that has also been the injury during the course of employment. In such cases, principles of notional extension is also applicable and, therefore, working conditions of the driver in the State Transport is such a hard, strenuous and abnormal and, therefore, it may happen that the workman may have the attack of paralysis but after ten years, if the corporation is permitted to terminate his service only because of his having been declared unfit for the post of driver though the Medical Board has opined that the workman is fit for any light work on equivalent post, then, where the workman will go for maintaining his family ? The workmen are also human being; they have also to live with dignity. If the workman has worked for such a long period of ten years would earn such inability and becomes unfit for the post on which he was working, then, he ought not to have been treated like an animal

who is being sent at the slaughter house after it becomes useless for the needs of a person. The Corporation has acted like that in a way that the moment, the workman was declared unfit for the post of driver, instead of accommodating him on any other equivalent post having light work, the corporation has terminated his services on that ground by saying that the recategorization is not possible and light duty work cannot be given as per the policy and settlement. If we read the resolution referred to hereinabove, it provides for such light duty in case of injury received during the course of employment and permanent unfit on account of defective eye vision. If the corporation could provide for such transfer of post in case of defective eye vision, then why not in case of attack of paralysis wherein a workman has become unable to perform the duties of driver and has been found fit for duty having light work ? The workman has remained out of job since 1996 till the award has been made by the labour court. IN view of these aspects of the matter, the Corporation ought to have considered as to how the workman, who has become unfit to work as a driver in view of the attack of paralysis, would maintain himself and his family ? The working conditions of the petitioner corporation may be weak but it can certainly be said that it may be because of the mismanagement on the corporation or for any other reason. On such a ground, the corporation cannot justify the termination of the workman who has become unfit for the work of driver because of the attack of paralysis. There are many other ways and means for effecting the economy measures. Therefore, the corporation cannot be permitted to justify the order of termination under the pretext of its weaker financial position. If the corporation is incurring successive losses, then, why it is not taking any effective steps since many years ? Why the Corporation has not been able to find out as to how and why it is incurring such successive losses for the years together? If permitted to justify the termination on such a ground, whether the financial condition of the corporation would be improved? Could the workmen as a whole be said the root cause for such successive losses ? Certainly not. I am of the opinion that this is the tension or worry or the headache of the highest officers of the Corporation. If the Corporation is passing such an illegal and unjustified order of termination and that too in respect of a workman who has become unfit because of the attack of paralysis, then, as a consequence thereof, if such illegal order is set aside by the competent forum, the corporation has to suffer the consequences thereof. If the corporation has to suffer because of the illegal action or the decision taken by its officer, then, why

the corporation is not taking any action against such officers whose illegal decisions have been set aside by the competent court ? For that, the corporation is not taking or initiating any action against such highest officers who are the real mischief mongers. The Corporation is taking the action against the drivers and conductors and helpers alone and any other small staff for small and negligible lapses on their part but similarly, if there is any lapse on the part of any officer in passing illegal order which has ultimately resulted into payment of huge arrears, then, the corporation is not taking any action against such erring officer. Corporation is not judiciously considering as to whether the action or the orders passed by its officers are just, proper and valid or not ? These observations have been made only with a view to point out that the contention about the financial position of the corporation cannot be accepted by this Court. The law is applicable to all persons, equally. The Corporation being the legal entity, is also bound by the law. However, the Corporation has not kept in mind the provisions of the Persons with with Disabilities (Equal Opportunities, Protection of Rights and Full Participation), Act, 1995 which has been enacted by the Parliament and which is applicable also to the corporation. Section 47 of the said Act provides a mandate to the Corporation in respect of non-discrimination in the Government employment. Section 47(1) thereof provides that no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service;

Provided that, if an employee, after acquiring disability is not suitable for he post he was holding, could be shifted to some other post with the same pay scale and service benefits;

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

Section 47(2) thereof provides that no promotion shall be denied to a person merely on the ground of his disability.

Proviso to section 47(2) provides that the appropriate Government may, having regard to the type of work carried on in any establishment by notification and subject to such conditions, if any, as may be specified

in such notification, exempt any establishment from the provisions of this section.

Therefore, considering the provisions of the said Act as aforesaid, I am of the opinion that section 47 of the said Act is also applicable to the Corporation and these are the mandatory provisions enacted by the Parliament to give protection to such persons who have acquired disability, who are suffering from disability during the course of employment. I am of the opinion that the case of the workman herein is squarely covered by the provisions of section 47 of the said Act. This aspect has been examined by the Hon'ble Apex Court in case of Kunalsing versus Union of India and others reported in 2003 AIR SCW page 1013. Relevant observations made by the Hon'ble Supreme Court in para 9, 10, 11 and 12 which are relevant in the facts of the present case are reproduced as under:

"9. Chapter VI of the Act deals with employment relating to persons with disabilities, who are yet to secure employment. Section 47, which falls in Chapter VII deals with an employee who is already in service and acquires a disability during his service. It must be borne in mind that section 2 of the Act has given distinct and different definitions of 'disability' and 'person with disability'. It is well settled that in the same enactment if two distinct definitions are given defining a word/expression, they must be understood accordingly in terms of the definition. It must be remembered that person does not acquire or suffer disability by choice. An employee who acquires disability during his service, is sought to be protected under section 47 of the Act specifically. Such employee, acquiring disability, if not protected, would not only suffer himself but possibly all those who depend on him would also suffer. The vry frame and contents of section 47 clearly indicate its mandatory nature. The very opening part of section reads ' no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service. The section further provides that if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits; if it is not possible to adjust the

employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. Added to this no promotion shall be denied to a person merely on the ground of his disability as is evident from sub section (2) of section 47. Section 47 contains a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires a disability during the service.On construing a provision of social beneficial enactment that too dealing with disabled persons intended to give them equal opportunities. protection of rights and full participation, the view that advances the object of the Act and seres its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act. Language of section 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during the service.

10. The argument of the learned counsel for the respondent on the basis of definition given in section 2(t) of the Act that benefit of section 47 is not available to the appellant as he has suffered permanent invalidity cannot be accepted. Because, the appellant was an employee who has acquired disability within the meaning of section 2(i) of the Act and not a person with disability.

11. We have to notice one more aspect in relation to the appellant getting invalidity pension as per rule 38 of the CCS (Pension) RUles. The Act is a special legislation dealing with persons with disabilities to provide equal opportunities, protection of rights and full partition to them. It being a special enactment, doctrine of generalia specialibus non derogant would apply. Hence rule 38 of the Central Civil Services (Pension) Rules cannot override section 47 of the Act. Further, section 72 of the Act also supports the case of the appellant, which reads:-

'72. Act to be in addition to and not in derogation of any other law.- The provisions of this Act, or the rules made thereunder shall be in addition to, and not in derogation of any other law for

the time being in force or any rules, order or any instructions issued thereunder, enacted or issued for the benefits of persons with disabilities.'

12. Merely because under rule 38 of CCS (Pension) Rules, 1972, the appellant got invalidity pension is no ground to deny the protection, mandatory made available to the appellant under section 47 of the Act. Once, it is held that the appellant has acquired disability during his service and if found not suitable for he post he was holding, he could be shifted to some other post with same pay scale and service benefits; if it was not possible to adjust him against any post, he could be kept on a supernumerary post until a suitable post was available or he attains the age of superannuation, whichever is earlier. It appears no such efforts were made by the respondents. They have proceeded to hold that he was permanently incapacitated to continue in service without considering the effect of other provision of section 47 of the Act."

Similarly, this question has also been examined by the Delhi High COurt in case of Kuldeep Singh versus Delhi Transport Corporation reported in 2003 (1) LLJ page 672. Relevant paragraphs 1,2 and 3 are quoted as under:

" A short controversy emerges in this writ petition as to whether in view of the payment made by the respondent on account of compensation to the petitioner who has rendered medically unfit and was retired prematurely on medical ground, the petitioner is not entitled to reinstatement under section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Hereinafter called 'the Act'). Learned counsel for the respondent has contended that the petitioner was paid a sum of Rs.33,125.00 as compensation under the scheme and a sum of Rs.70,941.60 was paid as compensation under Workmen's Compensation Act in lieu of alternative employment. It was contended before me that respondents have formulated the scheme in view of directive given by Supreme Court in Anand Biharai and Ors. v. Rajasthan State Road Transport Corporation and Anr. 1998-III-LLJ (Suppl)-1209. The scheme was formulated by the

respondent and the amount of compensation was paid. Mr. Vibhu Shankar has further contended that the respondent was not obliged to reinstate the petitioner. However, learned counsel for the petitioner has contended that the amount of Rs.33,1125.00 was paid towards medical charges. She has further contended that this amount as well as compensation under the Workmen's Compensation Act was paid prior to coming into force of section 47 of the Act and there is no escape for the respondent but to employ the petitioner in view of judgment of Supreme Court in Kunwar Pal Singh v. Delhi Transport Corporation & ORs. Civil Appeal No. 1864/2000 arising out of SLP (C) 7997/1999 where the Supreme Court held as follows:

'Special Leave granted.
Learned counsel for the appellant has brought to our attention section 47 of the Persons with Disabilities (Equal Opportunities etc.) Act, 1995. Having heard the learned counsel for the parties, we are of the opinion that it is the duty of respondent no.1 to employ the appellant in a Class IV post. If no such post exists, then, by virtue of section 47 of the Act, a supernumerary post shall be created within eight weeks from today and employment given to the appellant with such relief as the appellant may be entitled to.
The appeal stands disposed of accordingly.

Sd/-
BN Kirpal J
Sd/-
Syed Shah Mohammed Quadri,J.

2. In view of the decision of the Supreme Court it is no more open for the respondent to contend that as the workman has been paid compensation under the scheme and compensation under the Workmen's Compensation Act, the petitioner is not entitled to reinstatement in view of the specific provision of section 47 of the Act. Counsel for the petitioner has contended that the sum of Rs.33,125.00 was paid

towards medical expenses and not towards the scheme. Even if the said amount was paid under the scheme, the petitioner would has been entitled for reinstatement in view of the specific orders and directions passed by the Supreme Court in a similar case. There is no denial of the fact that the industry sustained by the petitioner was during the course of employment. That being so, the ratio of Kunwar Pal Singh case (supra) squarely applies to the facts of the present case.

3. I, therefore, direct respondent to reinstate the petitioner in Class IV post with protection of pay as contemplated under section 47 of the Act. If other is no post available the respondent would create a supernumerary post within eight weeks to accommodate the petitioner."

Similar aspect has also been examined by the Division Bench of the Delhi High Court in case of D.T.C. versus Rajvirsing, reported in 2003 I LLJ 865, recently. Relevant paragraphs 13, 14, 15 and 18, 19 are reproduced as under:

"13. History of legislation as noticed herebefore clearly shows that said Act was enacted in conformity with the proclamation on the full participation and equality of the People with Disabilities in the Asian and Pacific Region. It is not in dispute that the Act is beneficent in nature. It is also not in dispute that by reason of the said Act provisions have been made so that the persons with disability feel themselves as a part of the society which eventually may lead to his full participation of the work place. Nobody suffers from disability by choice. Disability comes as a result of an accident or disease.

14. The said Act was enacted by the Parliament to give some sort of succour to the disabled persons. By reason of Section 47 of the said Act which is beneficent in nature, the employer had been saddled with certain liabilities towards the disabled persons. Section 47 of the Act we may notice does not

contemplate that despite disability, a person must be kept in the same post where he had been working. Once he is not found suitable for the post he was holding, he can be shifted to some other post but his pay and other service benefits needs to be protected. The second proviso, appended to section 47 of the Act in no uncertain terms, state that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available. The said Act provides for social security for the disabled persons and if for the said purpose a statutory liability has been thrust upon the employer, the same cannot be held to be arbitrary.

15. Yet, again a, this Bench in Social Jurist v. Union of India (CWP 1283 of 2002, decided on August 13, 2002) observed:

'It is common experience of several persons with disabilities that they are unable to lead a full life due to societal barriers and discrimination faced by them in employment, access to public places, transportation, etc. Persons with disability are most neglected lot not only in the society but also in the family. More often they are an object of pity. There are hardly any meaningful attempts to assimilate them in the mainstream of the nation's life. The apathy towards their problems, is so pervasive that even the number of disabled persons existing in the country is not well documented.

2. T.R. DYE Policy Analyst, in his Book UNDERSTANDING PUBLIC POLICY says;

'Conditions in society which are not defined as a problem and for which alternative are never proposed, never become policy issues. Government does nothing and conditions remain the same.

3. This statement amply applies in the case of the disabled. At least this was the position till few years ago. The condition of the disabled in the society was not defined as a problem, and,

therefore, it did not become public isssue. It is not that this problem was not addressed. Various , Authors, Human Rights Groups have been focusing on this problem from time to time and for quite some time. But it was not defined as a problem which could become public issue. Until the realization dawned on the Government and the policy makers that the right of the disabled was also human right issue. '

It was further observed;

"Unless the mindset of the public changes, unless the attitude of the persons, and officials who are given the duty of implementation of this Act changes, whatever rights are granted to the disabled under the Act would remain on paper. "

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18. Grant of some relief to the disabled person had been in the mind of all concerned for a long time.

19. As indicated hereinbefore, 1995 Act came into force only after India became signatory to the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region. The said Act, therefore, must be read in the context of the said proclamation. "

I have also considered the contention of Mr. Trivedi that the labour court is not justified in granting 85 per cent back wages to the workman for the intervening period. The labour court has given detailed reasons for granting 85 per cent back wages for the intervening period. While considering the aspect of back wages, the labour court has kept in mind the negligence on the part of the corporation due to which initially ex parte award was made against the corporation (Exh.15) and for that, more than three years time has been consumed from 1996 to 1999 and then the matter was restored on the basis of the application submitted by the corporation. In his evidence, the workman has deposed that he remained unemployed and has not been able to get any job during the intervening period. All these facts disclosed by the

workman in his statement of claim and oral evidence were considered by the labour court while considering the aspect of back wages. One more aspect is also required to be considered while considering the award of the labour court qua back wages. Admittedly, the workman herein has acquired disability in view of the attack of paralysis suffered by him and, therefore, he was unable to do the work of driving which he was doing prior to such disability and in view of that also, it was very much difficult for him to survive and maintain himself and his family. If it would have been viewed from that angle, then, the award of 85 per cent back wages could be considered to be on its lower side. However, without entering into that aspect, I am agreeing with the findings and reasoning given by the labour court for giving reinstatement on any equivalent post having light work with 85 per cent of the back wages for the intervening period with continuity of service. The Corporation has also not been able to point out that the workman has been doing any such similar work which he has been doing prior to such disability acquired by him. Therefore, considering the law settled by the Hon'ble Apex Court and since the corporation has not been able to point out any exceptional circumstances for denying 85 per cent back wages or any part thereof to the corporation, I am of the opinion that the labour court has rightly granted the award in question with 85 per cent of the back wags for the intervening period. The law laid down by the Hon'ble Apex Court on this issue in case of Hindustan Tin Works Ltd. versus its Workmen reported in AIR 1979 SC page 75, relevant para 9 is reproduced as under:

"9. It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to the work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived deprived workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his

responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore. a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigating activity of the employer. If the D employer terminates the service illegally and the termination is motivated as in this case, viz ., to resist the workman's demand for revision of wages. the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages. Articles 41 and 43 of the Constitution would assist us in reaching a just conclusion in this respect. By a suitable legislation, to wit, the U.P. Industrial Disputes Act, 1947, the State has endeavored to secure work to the workmen. In breach of the statutory obligation the services were terminated and the termination is found to be invalid; the workmen though willing to do the assigned work and earn their livelihood, were kept away therefrom. On top of it the were forced to litigation upto the apex Court and now they are being told that something less than full back wages should be awarded to them. If the services were not terminated the workmen ordinarily would have continued to work and would have earned their wages. When it was held that the termination of services was neither proper nor justified, it would not only show that the workman were always willing to serve but if they

rendered service they would legitimately be entitled to the wages for the same. If the workman were always ready to work but they were kept away therefrom on account of invalid act of the employer, there is no justification for not awarding them full back wages which were very legitimately due to them. A Division Bench of the Gujarat High Court in Dhari Gram Panchayat v. Safai Kamldar Mandal(1), and a Division Bench of the Allahabad High Court in Postal Seals Industrial Co-operative Society Ltd. v. Labour Court 11, Lucknow & ors.(l), have taken this view and we are of the opinion that the view taken therein is correct."

Therefore, in view of the observations made by the Hon'ble Apex Court under the Persons Disablement Act and also considering various decisions of this court as well as the apex court according to my opinion that considering the disability due to the attack of paralysis earned by the workman, the labour court was right in granting reinstatement on the equivalent post with protection of pay with continuity of service with 85 per cent of the back wages for the intervening period. I am, therefore, of the opinion that the labour court was right in granting relief in favour of the workman in view of the law settled by this court and the Hon'ble Apex Court. Learned advocate Mr. Trivedi has not been able to point out any infirmity and/or procedural irregularity committed by the labour court. He has also not been able to point out any jurisdictional error committed by the labour court which are apparent on the face of it.

Recently, the Apex Court has examined the limitations of power in a petition under Article 226/227 of the Constitution of India, in the case of ESSEN DEINKI V. RAJIV KUMAR, reported in 2003 SC Labour & Service page 13. Relevant paragraphs are as under:

2. Generally speaking, exercise of jurisdiction under Article 227 of the Constitution is limited and restrictive in nature. It is so exercised in the normal circumstances for want of jurisdiction, errors of law, perverse findings and gross violation of natural justice, to name a few. It is merely a revisional jurisdiction and does not confer an unlimited authority or prerogative to correct all orders or even wrong decisions made within the limits of the jurisdiction of the courts below.

The finding of fact being within the domain of the inferior tribunal, except where it is a perverse recording thereof or not based on any material whatsoever resulting in manifest injustice, interference under the article is not called for.

3. The observations above, however, find affirmance in the decision of this Court in Nibaran Chandra Bag V. Mahendra Nath Ghughu. In Nibaran this Court has been rather categorical in recording that the jurisdiction so conferred is by no means appellate in nature for correcting errors in the decision of the subordinate courts or tribunals but is merely a power of superintendence to be used to keep them within the bounds of their authority. More recently, in Mani Nariman Daruwala Vs. Phiroz N.Bhatena this Court in a similar vein stated: (SCC pp. 149-50, para 18)

"In the exercise of this jurisdiction the High Court can set aside or ignore the findings of fact of an inferior court or tribunal if there was no evidence to justify such a conclusion and if no reasonable person could possibly have come to the conclusion which the court or tribunal who (sic) has come or in other words it is a finding which was perverse in law. Except to the limited extent indicated above the High Court has no jurisdiction to interfere with the findings of fact."

4. Needless to record that there is total unanimity of judicial precedents on the score that error must be that of law and patently on record committed by the interior tribunal so as to warrant intervention - it ought not to act as a court of appeal and there is no dissension or even a contra-note being sounded at any point of time till date. Incidentally, the illegality, if there be any, in an order of an inferior tribunal, it would however be a plain exercise of jurisdiction under the article to correct the same as otherwise the law courts would fail to subserve the needs of the society since illegality cannot even be countenanced under any circumstances.

5. In this context reference may also be made to a still later decision of this Court in

the case of Savita Chemicals (P) Ltd. Vs. Dyes & chemical Workers' Union wherein this Court in para 19 of the Report observed: (SCC p. 166)

"Under Article 227 of the Constitution of India, the High Court could not have set aside any finding reached by the lower authorities where two views were possible and unless those findings were found to be patently bad and suffering from clear errors of law."

Therefore, since there is no any procedural irregularity and/or infirmity or jurisdictional error committed by the labour court and since the award made by the labour court is just and proper, does not call for any interference of this court.

Thus, there is no substance in this petition and the same is required to be dismissed.

In the result, this petition is dismissed.

Dt.9.4.2003. (H.K. Rathod,J.)

Vyas